No. 15208

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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GEORGE J. SCHAEFER,

*Appellant,*

*vs.*

MILTON L. GUNZBURG, *et al.*,

*Appellees.*

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## APPELLEES' BRIEF.

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## TOPICAL INDEX

# TABLE OF AUTHORITIES CITED

CYCLOPEDIA



RULES



STATUTES

TEXTBOOKS PAGE

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### Preliminary Statement.

In his action below, plaintiff-appellant alleged the making of a specific oral partnership agreement with defendant, Milton L. Gunzburg; asserted that "Plaintiff does not have any adequate remedy at law"; and demanded an accounting, an injunction, a receivership and various other equitable remedies; and asked for a jury trial. Defendant-appellees' answer completely controverted the complaint.

On appellees' motion the action was tried to the court, resulting in judgment for defendant-appellees.

On this appeal, plaintiff-appellant's sole contention is that he was entitled to a jury trial. His contention is based entirely on the assertion that his complaint alleged a legal claim rather than an equitable one.

### The Position of Defendants-Appellees.

The primary position of defendants-appellees is that the claim pleaded by plaintiff-appellant was cognizable solely in equity, and that the trial court was correct in striking his demand for a jury trial.

But it is also believed that the evidence supporting the conclusion of the trial court on the merits is so overwhelming that, even had a jury trial been appropriate, any error in its denial was not prejudicial.

This second position makes it necessary to state the facts in some detail.

## Statement of Jurisdiction.

1. The jurisdiction of the Court of Appeals to review the judgment of the District Court is believed to be conferred by Title 28, United States Code, Section 1291.

2. The jurisdiction of the District Court herein is believed to be sustained by Title 28, United States Code, Section 1332(1).

3. The existence of jurisdiction in the District Court is shown by the allegations of the complaint that plaintiff is a citizen and resident of the State of New York, that the individual and corporate defendants are each and all citizens and residents of the State of California [R. pp. 3-4]; and that the amount in controversy exceeds the sum of $3,000, exclusive of interest and costs [R. p. 4]. The Findings of Fact are in accord with the jurisdictional allegations of the complaint [R. pp. 101-102].

4. The final judgment from which this appeal is taken was entered on March 28, 1956 [R. pp. 110-111]. Plaintiff served and filed his notice of appeal on April 26, 1956 [R. pp. 111-112].

## Statement of the Case.

George Schaefer (plaintiff-appellant, hereinafter called Schaefer or "appellant") was a producers' representative in the motion picture industry.

Early in 1951 he met Milton L. Gunzburg (the principal defendant and appellee) who had perfected a system of three dimension motion picture projection. Appellant represented that he could perform services for Gunzburg in securing the financing for, or production of, a motion picture in Gunzburg's system, called Natural Vision. Appellant agreed that any compensation for his services would be contingent upon his securing results.

Thereafter, appellant made some efforts, but utterly failed to achieve any of the results he had promised.

On the other hand, Gunzburg and his wife, Vera, by devoting to their project all of their time, effort and money over a period of three (3) years succeeded on their own in marketing their Natural Vision system.

In 1953, after Gunzburg's success was assured, appellant told Gunzburg (for the first time) that he felt he was entitled to 25% of Natural Vision for his effort and advice. When this request was rejected, he threatened that he would secure 50% of Gunzburg's enterprise. Six (6) months thereafter, he filed a complaint in which: he sought to establish an oral partnership with Gunzburg; claimed he was entitled to an equal share of the partnership profits; declared he had no adequate remedy at law; and demanded an accounting, an injunction, a receivership and various other equitable remedies, and demanded a jury trial [Complaint, Pars. Sixteenth, Thirty, Forty-Fourth and the Prayer; R. pp. 8-40]. The appellees' Answer denied the making of any partnership agreement

or the performance of the alleged partnership functions by appellant, and alleged various affirmative defenses.

After a hearing, the trial court granted appellees' timely motion to strike the demand for a jury trial on the ground that the complaint was cognizable and remedial in equity.

Thereafter, the case was tried to the Court. It involved over 2,000 pages of deposition (which required over a month to take); 25 witnesses; over 100 exhibits; and 21 trial days. Comprehensive trial briefs were filed with the trial court.

At the conclusion of the trial the Court rendered judgment for appellees, stating:

> "I have placed little credence upon the testimony of the plaintiff. It is my view that he attempted through this action to obtain something to which he was not entitled." [R. p. 100.]

After this extended record and trial, appellant is now here before this court making only a single claim of error.

Analysis discloses his appeal is singularly lacking in those qualities which commend the sympathetic review of an appellate tribunal.

Appellant does not claim that the findings below were made contrary to the evidence. Indeed, he concedes that he makes no such claim (Appellant's Br. p. 9).

Appellant does not claim that the judgment below has worked an injustice.

Appellant does not claim that unique or novel propositions of law are involved here.

Appellant asserts only that he should have been granted a trial to a jury instead of to a court.

It is respectfully submitted, as will be demonstrated hereafter, that appellant's claim of a right to trial by jury is completely unfounded and is based upon what can only be described as a misrepresentation of his complaint. As opposed to appellant's *assertions* as to the nature of his complaint, an actual reading of the complaint itself instantly discloses it is equitable in form, in substance, and in the relief sought. This being so, the court below properly denied a jury trial in an equitable proceeding.

## Facts.

Because of the highly colored and sketchy manner in which appellant has purported to state the facts we find it necessary to set them forth in greater detail than we should ordinarily like to do in an appellees' brief.

Milton L. Gunzburg, appellee and defendant (hereinafter called "Gunzburg"), an experienced motion picture writer, determined in 1949 to engage in motion picture production on his own account [R. pp. 1200-1201].

By June of 1950 he had invested almost all his own funds and borrowed substantial sums of money from his mother-in-law, Rose Berch, his father, Samuel Gunzburg, and his brother, Dr. Julian Gunzburg, pursuant to an agreement that if his venture succeeded, they would share in the profits [R. pp. 1204-1205]. These persons are all co-defendant-appellees in this case.

As a means of lending realism to their picture Gunzburg and his wife, Vera, who had worked with him full time on the project since its inception, turned to three dimensional photography [R. p. 1207]. They were guided in their research by Dr. Julian Gunzburg, a noted ophthalmologist and student of stereoscopic photography [R. pp. 1207, 1217-1218].

After intensive investigation, the Gunzburgs decided that they could produce a commercially feasible system. They bought the drawings and patents of an expert camera builder who had done some work in 16 mm. three dimension photography and under the guidance of Dr. Julian Gunzburg, began construction of equipment for a professional 35 mm. camera [R. pp. 1214, 1216]. Tests of the equipment were successful [R. p. 1217]. Thereupon, Gunzburg began to exhibit his system (called Natural Vision) to the motion picture industry [R. pp. 1226-1229, 1248-1251]. He also began negotiations for an exclusive franchise from the Polaroid Company, which produced the polarized material used in viewers, without which spectators at a three dimension motion picture could not achieve the illusion of depth [R. pp. 1217, 1223-1225].

In March of 1951, Gunzberg met appellant, who was known in the motion picture industry as a producers' representative, that is, a person who, for a percentage of the receipts of an independently produced motion picture, will exercise the producer's right to approve exhibition contracts [R. pp. 1327-1328]. Appellant told Gunzburg he believed he could be of assistance to him in securing distribution and financing for his proposed motion picture [R. pp. 1328-1329]. Shortly thereafter, appellant returned to his home in New York.

In April of 1951, Gunzburg journeyed from his home in Los Angeles to Cambridge, Massachusetts, where he successfully negotiated an exclusive contract to distribute viewers for the Polaroid Corporation [R. pp. 1286-1291].

From Cambridge, he traveled to New York to show his experimental 3-D film to various motion picture personages and representatives of the Army, Navy and Air Force [R. pp. 1292-1293; 1310-1312].

In New York, appellant and Gunzburg had a discussion in which appellant declared that he was not sure that 3%, the customary producers' representative fee, would be sufficient compensation because of the unusual problems presented by a three dimension motion picture and stated he might want 5% [R. pp. 1302-1303]. Appellant also said that if he were able to bring Gunzburg a deal warranting it, he would like to be cut in on the process. Appellant concluded that if he did not bring Gunzburg financing, he would not want anything because he had not done anything [R. pp. 1360-1361; 1487-1488].

Thereafter, despite some effort on his part, appellant was completely unable to secure financing or to induce anyone else to make a picture using Gunzburg's process [R. pp. 103-104; Findings, Par. VII, R. p. 358].

In December of 1951, Gunzburg met Arch Oboler, an independent producer [R. p. 1362]. At that time, Oboler had not met appellant who had nothing whatsoever to do with Oboler's introduction to Gunzburg [R. p. 303].

Oboler was impressed by Gunzburg's system and entered into a written contract with Gunzburg, securing the right to use the Natural Vision process on one picture in return for a 20% profit participation to Gunzburg [Pltf. Ex. No. 42].

At Gunzburg's suggestion, Oboler hired appellant to act as producers' representative on the proposed 3-D picture which was to be called BWANA DEVIL [R. pp. 1362-1363]. The contract called for a 3% fee to appellant [Appellees' Ex. G].

In his representation of Oboler's company (called Gulu Picture Company), appellant vigorously championed Oboler in various disputes that arose between Oboler and Gunzburg as to their respective rights under the licensing agreement [R. pp. 1612-1613].

In November of 1952, BWANA DEVIL was premiered in Los Angeles and achieved popular success. In December of 1952, Oboler was approached by Edward Alperson, a motion picture exhibitor, who wished to purchase BWANA DEVIL. Appellant represented Oboler in the sale under his employment agreement which gave him a 5% commission on any sales effected. These negotiations directly affected Gunzburg's interests [R. pp. 319-339].

Appellant's unconscionable conduct in the negotiations resulting in a sale, as well as in other matters which directly affected Gunzburg, has raised the issue of appellant's "unclean hands." To avoid duplication, the facts (which come entirely from appellant's own testimony) will not be stated here but will be set forth in the argument which deals with his unclean hands.

During the years 1951 and 1952, appellant devoted the great bulk of his time to his various business enterprises and did not even claim that he had spent more than 5% of

his time in an effort to secure financing or production for Gunzburg [R. pp. 499-500]. From November, 1952, on, such of appellant's time as was not devoted to his other interests was spent in performing his duties to Gulu Picture Company.

*At no time* did appellant ever: contribute any capital to Gunzburg's Natural Vision enterprise; have any direction in its management; negotiate or sign any contracts on its behalf; hire or fire help; share in the profits; or in any way enjoy or engage in any of the attributes of a partnership [R. pp. 411-415]. And at no time did appellant in any communication between himself and Gunzburg make any reference to a partnership between himself and Gunzburg, or in any way refer to the terms of any alleged agreement between them [R. pp. 292-293].

Appellant made no memo or note of his alleged partnership agreement with Gunzburg, although the mere recitation of its alleged terms took over four printed pages [R. pp. 8-12, 292-296].

Although he alleged his agreement was made in April of 1951, appellant never made any claim upon Gunzburg until March of 1953 [R. pp. 403-409]. At their last meeting appellant was censured by Gunzburg for making a demand, not only because it was completely unfounded, but also because, as an aggravation of the matter, Gunzburg had just begun to receive notice of various activities by appellant highly inimical to Gunzburg's business [R. pp. 1404-1406; 1613-1615].

Appellant left the meeting and never thereafter communicated with Gunzburg. Six months after the meeting, on October 27, 1953, appellant filed the complaint which gave rise to this case [R. p. 40].

## Summary of Argument.

The appellant's complaint stated a claim by an alleged partner for a decree establishing his rights as a partner, asked for a dissolution of the partnership, an accounting of partnership profits and losses, the division of partnership properties and profits and asked for various forms of equitable relief *pendente lite*. This is undisputably an equitable action, and, hence, appellant had no right to a trial by a jury. Appellant's efforts to make it appear that he had stated a legal cause of action, as distinguished from an equitable cause, are based on a misrepresentation by him of the actual language and substance of his complaint. The fallacy of his position is immediately disclosed by a reading of the complaint itself.

Assuming, but only for the purposes of argument, that appellant had been entitled to a jury trial, he suffered no prejudicial error by reason of the judgment below, because the evidence against him was so overwhelming reasonable men could not differ from the conclusion that there was no partnership agreement, as alleged by appellant in his complaint.

And, finally upon the basis of evidence, coming entirely from his testimony and writings and the testimony of his own witnesses, it is indisputable that appellant was guilty of unclean hands; and so is barred from the court here and below, *"in limine."*

## ARGUMENT.

### I.

### The Original Complaint States a Claim by an Alleged Partner: for a Decree Establishing His Rights as a Partner, for a Dissolution of the Partnership, Payment of Partnership Debts, an Accounting of Partnership Profits and Losses, the Following of Assets of the Partnership Into the Hands of Allegedly Guilty Third Persons, Division of Partnership Properties and Profits Between the Parties, an Award of Incidental Damages to the Extent Equitable Relief Might Prove Inadequate, and Finally, Equitable Relief Pendente Lite.

### This Is a Classic Equitable Action. There Is No Right to Jury Trial of an Equitable Action Under the Seventh Amendment to the Constitution of the United States.

#### A. The Only Issue Before This Court Is the Propriety of the Trial Court's Order at the Time It Was Made. This Issue Is Determinable Solely by Reference to the Complaint; for, It Was This Pleading Which Was the Basis of the Trial Court's Order.

On March 5, 1954, upon timely motion, the trial court made the following order:

> "3. The Motion to Strike the Demand for Jury Trial is granted to the extent that the Court will try first at a separate trial of the issue, as herein ordered, whether Plaintiff and Defendant Milton L. Gunzburg were partners, and the nature and character of their partnership agreement, if any; it appearing to the Court that on the aforesaid issue Plaintiff does not have a right to trial by jury:
>
> "4. The Motion for an Order of the Court for a Separate Trial is granted and the Court hereby

> orders that the issue of the existence of a partnership relation between Plaintiff and Defendant Milton L. Gunzburg, and the nature and character of their partnership agreement, if any, be tried by the Court first and separately from the other issues in the case. Whether a jury trial of other issues is to be determined after the issues are tried as directed in this paragraph;" [R. pp. 56-57].

Approximately a year later, on March 7, 1955, the Court permitted appellant to file an amended complaint. *No demand for a jury trial was made in relation to the amended complaint.* Thereafter, all parties went to trial *without objection at any time* to trial by the Court of *all* of the issues embraced in the Findings of Fact, Conclusions of Law and Judgment [R. p. 108; and Appellant's Br. p. 8, footnote 1].

Appellant's sole attack against the judgment below is upon the propriety, at the time it was made, of paragraph 3 of the Court's said order for trial by Court of the issue therein stated. *Appellant and appellees are agreed* that the propriety of the trial court's order must be determined by the contents of the complaint,[1] and conversely not upon the amended complaint. (Throughout this brief, when referring to the complaint, we mean the pleading upon which the Court's order was based, and not the amended complaint.)

Judicial authority is in complete accord that whether or not a plaintiff is entitled to a jury trial on issues or claims

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[1]Appellant's Opening Brief, p. 23, footnote 2.

alleged in his complaint is entirely determined from the face of the complaint.

*Canister Co. v. Leahy* (3 Cir.), 182 F. 2d 510, 513, cert. den. 342 U. S. 893, 72 S. Ct. 201, 96 L. Ed. 669;

*Ring v. Spina, et al.* (2 Cir.), 166 F. 2d 546, 549;

*Fraser v. Geist* (D. C., Pa.), 1 F. R. D. 267, 269;

*Rosanna Knitted Sportswear v. Lass O'Scotland* (D. C., N. Y.), 13 F. R. D. 325.

**B. Appellant's Representation in His Brief of the Nature of His Complaint Is Neither Correct, Accurate nor Fair, as a Comparison of His Representation With the Allegations and Prayer of the Complaint Demonstrates.**

The Seventh Amendment to the United States Constitution preserved the right to jury trial only as it existed at common law in England prior to and at the time of the adoption of the Constitution.

*Dimick v. Schiedt,* 293 U. S. 474, 79 L. Ed. 603, 55 S. Ct. 296;

Cyc. Fed. Proc., Sec. 31.17, p. 205.

The Rules of Civil Procedure merely implement this right, and do not enlarge or restrict it.

5 Moore's Federal Practice, Sec. 38.07, pp. 39-41, and Sec. 38.11(6), p. 115.

There is no right to jury trial of claims historically cognizable or remedial in equity.

*Johnson v. Gardner* (9 Cir.), 179 F. 2d 114, cert. den., 339 U. S. 935, 94 L. Ed. 1353, 70 S. Ct. 661.

So undoubted is the law set forth above, and so clearly is appellant's complaint equitable in form, substance, and relief sought that his contention he was entitled to a jury trial may very well be deemed frivolous. The basic lack of merit of his appeal can be concealed only by ignoring the actual complaint filed with the trial court and projecting a distorted picture of it.

This is what appellant has done in his brief.

Appellant summarizes his thirty-two page complaint in one paragraph. He then argues that this summary presents a legal claim upon which he had the right to jury trial.

The fundamental flaw is that this summary is neither a correct, accurate or fair representation of the complaint.

To demonstrate this it is only necessary to compare appellant's representations with his actual allegations. Appellant asserts in his brief:

> "The action below was brought for damages for breach of a contract to share profits. By the terms of that contract, plaintiff's complaint alleged, defendant Milton L. Gunzburg agreed to pay to plaintiff, in return for plaintiff's agreement to render certain specified services, *a sum equal to 50%* of the profits derived by the *various defendants from a family business* venture . . . the complaint prayed, among other things, for an accounting of such profits and a *money judgment in favor of plaintiff for 50%* thereof. . . ." (Appellant's Op. Br. pp. 1 and 2) (emphasis added).

Appellant is not consistent in his own statement, for he also says in his brief that the complaint alleged:

> ". . . an agreement between plaintiff and Gunzburg by which plaintiff agreed to render his services to

> Gunzburg in the promotion and exploitation *of the latter's business,* in return for *Gunzburg's promise to pay plaintiff 50%* of the profits therefrom. . . ." (Appellant's Op. Br. p. 22) (emphasis added).

The errors and misrepresentations in these statements are:

1. Contrary to appellant's representation, *the complaint does not allege an employment contract* but *a partnership.* The complaint alleges that plaintiff and defendant Gunzburg *formed and jointly owned and operated* over a considerable period of time, namely from April 20, 1951, through at least March 30, 1953, a *partnership* business. Several excerpts demonstrate this point.

Paragraph Sixteenth of appellant's complaint states, in part, as follows:

> "In such contract it was agreed that plaintiff Schaefer and defendant Milton L. Gunzburg should form and enter into, and by the terms thereof, plaintiff Schaefer and defendant Milton L. Gunzburg then and there did form and enter into, a partnership for the purpose of commercially exploiting and licensing the manufacture and use of such 3-D camera process. . . ." [R. pp. 8 and 9].

Paragraph Seventeenth states, in part, as follows:

> "In such contract, it was agreed that defendant Milton L. Gunzburg should hold and retain as a matter of convenience, solely for the benefit of such partnership enterprise, title to such 3-D camera process inclusive of the physical camera equipment and accessories thereof, and the exclusive patent and licensing rights pertaining thereto; that defendant Milton L. Gunzburg should attend to and render his services in relation to technical developments of such 3-D proc-

ess; that plaintiff Schaefer should attend to and render his services in relation to the business aspects of the partnership enterprise. . . ." [R. p. 9].

Paragraph Thirty-Seventh states, in part, as follows:

"Defendant Milton L. Gunzburg further breached the aforementioned partnership contract and further violated plaintiff's rights by virtue thereof, in that defendant Milton L. Gunzburg on or about March 30, 1953 denied that plaintiff had any interest as a partner. . . ." [R. p. 28].

2. Further, the complaint does *not* allege a promise by defendant Milton L. Gunzburg to pay plaintiff a sum equal to 50% of the profits, or 50% of the profits derived from the venture, as appellant would have the Court believe. Instead it alleges that net profits of the partnership were to be shared *equally* between the two alleged partners after certain percentages were allocated to others.

Paragraph Nineteenth of the complaint states, in part, as follows:

"In such contract it was further agreed that the net profits of the partnership enterprise would be divided in equal shares between plaintiff Schaefer and defendant Milton L. Gunzburg subject only to the disposition of small percentage interests in the profits . . . and defendant Milton L. Gunzburg specifically assured plaintiff, that in no event would the disposition of such small percentage interests in the net profits to such other four persons exceed an aggregate of Fifty (50%) Per Cent of the net profits" [R. pp. 11, 12].

Paragraph Eighteenth of the complaint states as follows:

"In such contract it was further agreed that plaintiff would bear whatever expenses as might be in-

curred by plaintiff and that defendant Milton L. Gunzburg would bear whatever expenses as might be incurred by such defendant Milton L. Gunzburg, subject to the rights of both partners to a reappraisal at a later date of their respective expenditures on behalf of the partnership enterprise and any reciprocal adjustments as might then be warranted" [R. p. 10].

3. There is *no* allegation in the complaint that plaintiff was damaged in a sum certain, or in the amount of 50% of the net profits, or a sum equal thereto, or in any amount.

Moreover, the complaint contains no prayer for a money judgment for 50% of the net profits, or a sum equal thereto. In no sense was the action brought for "damages for breach of contract."

On the contrary, consistent with the allegations of the complaint in regard to profits the prayer asks:

> "13. That the properties and profits of such Natural Vision partnership enterprise, after payment of the partnership debts and liabilities, be divided equally between plaintiff Schaefer and defendant Milton L. Gunzburg, according to their respective interests;" [R. p. 38].

4. The complaint does not confine the relief sought to money allegedly earned *prior* to the filing of the complaint as appellant implies by stating in his brief that

> ". . . The complaint alleged that the business had earned profits in excess of $6,000,000.00, . . ."[2]

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[2]Appellant's Opening Brief, Argument, A.1., pp. 22-23.

In fact the complaint sought *prospective* relief to the time of the decree (which only equity could give), alleging in Paragraph Thirty-Fifth, in part, as follows:

> ". . . all of such additional substantial proceeds and gross profits plaintiff estimates *will be* in the aggregate of between Six Million ($6,000,000.00) Dollars and Eight Million ($8,000,000.00) Dollars" [R. p. 25] (emphasis added).

The *only* reference in the entire complaint to money damages is in paragraph 15 of the *prayer* [R. p. 39]. *There are no allegations of damage in the body of the complaint.* This prayer necessarily, therefore, is a demand for *incidental* money damages to the extent equitable relief might prove inadequate. Appellant does not rest his argument in any way upon this demand, since his argument is directed to the fictitious promise to pay 50% of profits.

5. Finally, appellant's attenuated summary omits the many equitable claims asserted against the various defendants as the basis for following assets into their hands. Also omitted is the fact that *the relief* sought in the action was *exclusively* equitable [Prayer, R. pp. 34-39].

**C. The Original Complaint Is a Classic Equitable Action Which Could Only Be Tried in Equity in View of the Alleged Partnership Relation, the Equitable Rights Asserted, and the Remedial Relief Sought.**

1. In Determining Whether the Claims and Issues Were Basically Equitable or Legal the Court Considers Both the Allegations of the Complaint and the Relief Demanded.

Appellant argues that the Court's order for a separate and prior trial of the issue of the existence of the partnership relation (which he calls the "agreement") converted that issue into a legal issue. This resulted, he argues, because other issues, including those relating to relief, were separated for later disposition after the Court first determined whether or not there was a partnership[3] (and thereby ascertained if plaintiff had *any* right to relief.)

On this appeal the Court is not concerned with whether a jury or judge is a better trier of fact—the question is one of *right* to jury trial. A plaintiff has such right only as to matters asserted in the complaint over which equity did not have jurisdiction at the time the Seventh Amendment was adopted.

Appellant's argument is fallacious in the first place because the relief demanded in the complaint necessarily affects the fundamental question of whether the action is legal or equitable. A bologna cut in half is still bologna. A historic equity action tried in two phases remains an equity action.

An illustration of the way the relief demanded determines the character of the action is an action for specific performance of a contract.

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[3]Appellant's Opening Brief, Argument B., p. 32.

Such an action is equitable. However, if a demand for money damages were substituted for the equitable relief the action would become legal.

*Canister Co. v. Leahy* (3 Cir.), 182 F. 2d 510, cert. den. 342 U. S. 893, 72 S. Ct. 201, 96 L. Ed. 669;

5 Moore's Federal Practice, Section 38.17, page 158.

The granting of a separate trial under Rule 42(b) of the Rules of Civil Procedure is a purely procedural matter and has no bearing upon, and does not change, the character of the complaint as appears from its allegations and prayer, which are the "proving grounds" for determining the right to jury trial.

*Fraser v. Geist* (D. C., Pa.), 1 F. R. D. 267, 269.

The remedies sought necessarily affect whether an action is historically legal or equitable, because the function of equity was to give relief where the legal remedy was inadequate.

*Johnson v. Gardner* (9 Cir.), 179 F. 2d 114, 116-117;

*Bellavance v. Plastic-Craft Novelty Co.* (D. C., Mass.), 30 Fed. Supp. 37, 39;

*Upjohn Co. v. Schwartz* (D. C., N. Y.), 117 Fed. Supp. 292.

Appellant erroneously assumes that because a legal right to damages may arise from a contract, equity does not have jurisdiction to ascertain the legal rights as the basis for equitable relief.

The contrary is true, for equitable jurisdiction is exclusive if the relief sought is equitable although the right involved is legal.

1 Pomeroy's Equity Jurisprudence, Fifth Edition, Section 138, pages 189-190, states:

> "The exclusive jurisdiction includes, *secondly,* all civil cases in which the remedy to be granted—and, of course, the remedial right—is purely equitable, or one which is recognized and administered by courts of equity, and not by courts of law. In the cases of this class, the primary right which is maintained, redressed, or enforced is sometimes equitable and is sometimes legal; but the jurisdiction depends, not upon the nature of these rights, estates, or interests, but wholly upon the nature of the *remedies.* Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the *exclusive* jurisdiction of equity, even though the primary right, estate, or interest of the party is one which courts of law recognize, and for the violation of which they give *some* remedy. *Thus a suit to compel the specific performance of a contract falls under the exclusive jurisdiction of equity, although a legal right also arises from the contract, and courts of law will give the remedy of damages for its violation. . . .*" (Emphasis added.)

Secondly, in trying the "existence," "nature and character" of the alleged partnership agreement, the trial court here was exercising equitable jurisdiction apart from the restorative remedial relief sought. Appellant sought a declaration of his rights [R. p. 34, par. 1, Prayer]. One class of equitable remedies is the declaration and establishment of rights and interests, legal or equitable.

> 1 Pomeroy's Equity Jurisprudence, Section 171, par. 3, pages 228-229.

We know of no authority supporting plaintiff's illogical argument that a separate trial of various parts of a case changes an equitable action into a legal one by the mere fact of the separation order. None of the cases he cites does so. They hold only that a party is entitled to trial of legal issues by a jury although equitable issues are **joined** in the same action.[4]

For example, *Keene v. Hale-Halsell Co.* (5 Cir.), 118 F. 2d 332, cited in Appellant's Opening Brief, page 33, was an action by a creditor to recover a debt and to pursue property fraudulently transferred to apply against the debt. The Court held it was not necessary to exhaust the remedies at law available to a creditor by first obtaining a money judgment before suing in equity, because legal and equitable issues could be tried in one action under the reformed procedure.

*H. B. Zachry Co. v. Terry* (5 Cir.), 195 F. 2d 185, cited in Appellant's Opening Brief, page 34, *actually held that the plaintiff did not have the right to jury trial,* because of the complex nature of the accounting demanded.

*Bruckman v. Hollzer* (9 Cir.), 152 F. 2d 730, upon which appellant relies so heavily, is not even in point on this issue. In that case the complaint alleged three counts, the first, a claim for damages for copyright infringement; the second, an accounting for profits from appropriation of copyright; the third, injunction against continued infringement of copyright.

All three claims involved a common question of fact, *i. e.,* whether there was infringement. All parties were agreed that the first claim, if tried separately, would be a

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[4]Cases cited in Appellant's Opening Brief, pp. 32-35.

legal claim upon which there was a right to jury, and that the two remaining claims were equitable.

The two questions involved in the case were (1) whether combining the legal claim with the equitable claims deprived plaintiff of a right to jury trial on the legal claim and (2) since there was a common question of fact, *i. e.,* infringement, upon which all three claims rested, whether the legal claim or the equitable claims should be tried first.

The court held that *a joinder* of a *legal claim for damages* with equitable claims did not deprive the plaintiff of a right to jury trial on his legal claim.

2. The Complaint Is Cognizable Solely and in Entirety in Equity for the Following Reasons:

a. *Basically, the Action Is by an Alleged Partner for Dissolution of a Partnership, Winding Up of the Partnership Business and Recovery of His Share of Its Profits and Properties. Prior to an Accounting and Settlement, Which Were Sought in the Action Itself, Appellant Was Precluded From Suing at Law.*

40 American Jurisprudence, Partnership, Section 461, page 450, states:

> ". . . Where there has been no settlement of partnership affairs, the remedy of one partner against his copartner for conversion of the firm property by the latter is in equity, and not by way of an action at law for damages. Also, when the partner seeks to recover from the copartner a share of the partnership profits, he must resort to an action in equity, and cannot as a general rule bring an action at law. . . ."

See, also, text discussions and cases cited:

68 C. J. S., Partnership, Section 110(a), p. 552, which states the reasons for the rules, and Section 112, p. 555;

Pomeroy's Equity Jurisprudence, Vol. 4, Fifth Ed., Section 1421, p. 1078;

168 A. L. R., 1088, 1091, "Partnership-Action between partners."

California authority is completely in accord:

*Dukes v. Kellogg,* 127 Cal. 563, 60 Pac. 44;

*Johnstone v. Morris,* 210 Cal. 580, 292 Pac. 970;

*Hadley v. Ellis,* 123 Cal. App. 2d 758, 267 P. 2d 442;

*Cunningham v. deMordaigle,* 82 Cal. App. 2d 620, 186 P. 2d 423.

The complaint falls squarely within these principles. There is nothing in the complaint to bring it within any exceptions to the general rule.

The cases which appellant cites[5] merely involved the question of whether it was permissible for the trial court to give a money judgment in a particular case without requiring an accounting between joint venturers. In each case the court accepted the general rule we have stated but found it inapplicable to the particular facts.

In the *Barlin* case the joint venture was terminated and dissolved. The suit was for a sum certain and the court

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[5]*Barlin v. Barlin,* 145 A. C. A. 456, 459-460, ..... P. 2d ....., (Oct. 24, 1956); (Appellant's Op. Br. p. 24).

*Elsbach v. Mulligan,* 58 Cal. App. 2d 345, 369-370, 136 P. 2d 651. (Appellant's Op. Br. p. 24.)

found specifically that an accounting was not necessary. The *Elsbach* case similarly is not applicable. Basically it was an action for damages by one joint venturer against another for wrongfully inducing termination of contractual relations with the joint venture by third persons.

b. *All of the Remedies Requested by Appellant Were Equitable, With Money Damages Merely Incidental to Equitable Relief and Dependent Thereupon.*

The general rule is that equity "having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law."

> *Greene v. Louisville & Interurban Railroad Co.*, 244 U. S. 499, 520, 37 S. Ct. 673, 682, 61 L. Ed. 1280, 1291.

There is no right to a jury trial on any issue of damages that is *incidental* to the equitable relief which the claimant seeks.

> *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 40, 49, 57 S. Ct. 615, 81 L. Ed. 893;
>
> *Johnson v. Gardner* (9 Cir.), 179 F. 2d 114, cert. den.; 339 U. S. 935, 70 S. Ct. 661, 94 L. Ed. 1353;
>
> 5 Moore's Federal Practice, Section 38.19(2), page 169.

The only prayer for money damages in the complaint is in paragraph 15 thereof [R. p. 39]. The complaint itself does not contain any allegation of damages in its averments. Of necessity, the amount of money damage in this case would depend upon the extent to which equitable

relief might be adequate. If profits were available, they would be ordered to be paid over. If not, money damages to the extent necessary would be a substitute, and the same applies to the assets and properties of the business.

Plaintiff directly alleged as much by pleading:

> "Forty-Fourth: Plaintiff does not have any adequate remedy at law" [Cmplt., par. Forty-Fourth, R. p. 34].

The cases hold that such an allegation constitutes *an election* for suit in equity, *eliminating* any right to a jury trial.

> *Arnstein v. Twentieth-Century Fox Film Corporation* (D. C., N. Y.), 3 F. R. D. 58, 59;
>
> *Young v. Loew's Inc.* (D. C., N. Y.), 2 F. R. D. 350.

Appellant's argument[6] that, as a matter of substantive law, an agreement to pay a person a share of profits as compensation is enforceable even if the parties are not partners, is, of course, undisputed. However, whatever the merits of such *a hypothetical case, here* plaintiff alleged *a partnership* and sought rights and remedies of a partner. Having lost after a full and fair trial, appellant may not now collaterally attack and go behind his own pleadings; for the right to a jury trial is judged from the *allegations and prayer* of the complaint.

> *Canister Co. v. Leahy* (3 Cir.), 182 F. 2d 510, 513;
>
> *Ring v. Spina* (2 Cir.), 166 F. 2d 546, 549.

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[6]Appellant's Opening Brief, p. 25.

c. *Even Viewed Solely as an Action for an Accounting and Ignoring the Basic Equitable Character of the Proceeding, Plaintiff Would Not Be Entitled of Right to Jury Trial. The Accounting Was Not Merely for Purposes of Calculating the Amount of a Money Judgment. The Accounting Involved and Was Dependent Upon Equitable Relief, Pertained to Mutual Accounts and Third Persons and Was Too Complex for Trial by Jury.*

In regard to an accounting the prayer of the complaint requests (1) that defendant Milton L. Gunzburg account for "all assets, profits and effects of such partnership enterprise," and that he be declared a trustee *"ex-maleficio"* thereof [R. p. 37, par. 10]; (2) that the remaining defendants each be required to account for assets and profits of the "Natural Vision partnership enterprise" and that they be declared trustees *ex-maleficio* thereof [R. pp. 37-38, Prayer 11]; (3) that each defendant be ordered to pay over to the partnership all assets and profits thereof withheld from the partnership [R. p. 38, Prayer 12], and (4) that partnership debts be paid and the assets and profits thereafter divided between plaintiff and defendant Milton L. Gunzburg [R. p. 38, Prayer 13].

Despite the complicated relief sought by this prayer, appellant would have this Court believe that his complaint simply sought to enforce a personal promise to pay as compensation for services a sum equal to 50% of the profits of another's business.[7]

Clearly the accounting sought by the prayer was not as the basis for a money judgment, for consistent with his partnership theory plaintiff asked that the assets and

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[7]Appellant's Opening Brief, p. 1.

profits be turned over to the alleged partnership, and that *debts* and *liabilities* thereof be paid *before* distribution to the alleged partners. A partner's claim for his share of profits is merely an item in the firm account and a settlement must be had before he can recover any specific sum.

> *Cohen v. Erdle,* 126 N. Y. S. 2d 32, 34, 282 App. Div. 569, 168 A. L. R. 1088, 1094—Anno.—Partnerships—Actions between partners.

Involving, under the allegations of the complaint here, numerous defendants and an adjustment of accounts between the alleged partners, the accounting could *only* be had in equity.

In his action appellant sought to have turned over to the partnership assets of various corporate defendants, assets held by defendant Milton L. Gunzburg in his own name and allegedly equitably owned by the partnership. Plaintiff's claim was equitable in nature and equitable relief would be required to reach the assets.

Even where the underlying claim is legal and there is a bare contract to pay a sum of money which can only be determined by an accounting if the issues are too complicated for a jury, so that the legal remedy is inadequate, the court may deny jury trial.

In *Kirby v. Lakeshore & M. S. R. R. Co.,* 120 U. S. 130, 134, 7 S. Ct. 430, 432, 30 L. Ed. 569, the Supreme Court said:

> "The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity."

Accord:

*H. B. Zachry Co. v. Terry* (5 Cir.), 195 F. 2d 185, action by an employee for 50% of profits of farm pursuant to contract;

*Balfour v. San Joaquin Valley Bank* (C. C. N. D., Cal.), 156 Fed. 500, action by a depositor against a bank for wrongful diversion and misapplication of funds—contains excellent review and analysis of problem;

5 Moore's Federal Practice, Section 38.25, pages 198-202;

4 Pomeroy's Equity Jurisprudence, Section 1421, page 1077.

It is true, as the authority cited at page 26 of Appellant's Opening Brief holds, that an account to ascertain damages may be had in some cases at law where the underlying claim is legal.

For example:

*Ex parte Peterson,* 253 U. S. 300, 64 L. Ed. 919, 40 S. Ct. 543, was an action to recover the balance due for goods sold and delivered.

*Mounger v. Wells* (5 Cir.), 23 F. 2d 374, was an action by brokers to recover a sum certain which was the alleged balance owing on a commissions account. No discovery or accounting was sought.

However, the foregoing case, as well as *United States v. Sinclair Prairie Oil Co.* (D. C., Okla.), 21 Fed. Supp. 179, acknowledge that where the accounts are complex, the action is equitable because the legal remedy is inadequate.

*Bercovici v. Chaplin* (D. C., N. Y.), 3 F. R. D. 409, is not in conflict. The court merely found it practical for

the jury to ascertain the damages where the contract involved there required payment of a fixed percentage of gross receipts, and there was no interdependence between the equitable and legal claims asserted in the complaint.

The remaining cases cited by appellant are similar, involving claims based on traditional legal rights and simple accounts and fall in that narrow area where the legal relief at old common law was considered adequate.

Appellant *acknowledges* that "accounting actions" are within *the concurrent jurisdiction* of law and equity.[8]

The Supreme Court has held, referring to the Seventh Amendment:

> ". . . This provision, correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, *nor that which they have exercised* as *concurrent* with courts of law but should be understood *as limited* to rights and remedies *peculiarly* legal in their nature; . . ." (Emphasis added.)
>
> *Shields v. Thomas, et al.,* 18 How. 253, 262, 59 U. S. 253, 15 L. Ed. 368, 372.

See, also:

> *Fitzpatrick v. Sun Life Assur. Co. of Canada* (D. C., N. J., 1941), 1 F. R. D. 713, 716.

The Supreme Court has also held, in *United States v. Louisiana,* 339 U. S. 699, 706, 94 L. Ed. 1216, 1220, 70 S. Ct. 914:

> "Louisiana's motion for a jury trial is denied. We need not examine it beyond noting that this is an

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[8]Appellant's Opening Brief, p. 27.

equity action for an injunction and accounting. The Seventh Amendment and the statute, assuming they extend to cases under our original jurisdiction, are applicable only to actions at law. See Shields v. Thomas (U. S.), 18 How. 253, 262; 15 L. Ed. 368, 372; Barton v. Barbour, 104 U. S. 126, 133, 134, 26 L. Ed. 672, 676, 677."

In conclusion, so clearly does the complaint seek relief available only in equity that appellant in his brief was obliged to distort the contents of his complaint before he could make his argument. His appeal may well be deemed frivolous.

Because appellant's entire argument is grounded on an inaccurate summary of his complaint, his argument, viewed in the light of the true facts, has no substance.

The complaint itself, as opposed to appellant's representation of its terms, is a classic equitable action upon which there is no right to jury trial.

That certain factual issues were tried first, as a matter of convenience, is entirely immaterial to the right of jury trial.

## II.

## Even Where Evidence Is Conflicting, if Reasonable Men Cannot Differ as to the Conclusion to Be Drawn From the Evidence, a Directed Verdict Must Be Granted. The Evidence in This Case That There Was No Partnership Agreement as Claimed by Appellant, Is of Such Nature Here. Accordingly, Had There Been a Jury, a Directed Verdict for the Appellees Would Have Been Proper.[9]

Appellant concedes (p. 9 of his Brief) that before he can request the favorable consideration of this Court, he must show from the record that the evidence would not have permitted the direction of a verdict against him.

He must, also, of course, overcome Title 28, United States Code, Section 2111:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

The cases are clear that even where there is a conflict in evidence, if reasonable men cannot differ, or if the evidence is so overwhelmingly on one side, a directed ver-

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[9]Appellees respectfully submit that the pleadings themselves conclusively establish the equitable nature of appellant's complaint and are decisive against him of the issue on appeal. The presentation of further arguments arises from the belief that the Court should properly have before it all the reasons which support affirmance of the judgment below.

dict is proper. Where a directed verdict would have been proper, denial of a jury trial is not reversible error.

*Southern Pacific Company v. Pool,* 160 U. S. 438, at 440 and 40 L. Ed. 485, 487, 16 S. Ct. 338;

*Backus v. Taplin* (7 Cir.), 81 F. 2d 444, at 447, and particularly the last paragraph on p. 449;

*Pacific Can Company v. Hewes* (9 Cir.), 95 F. 2d 42, at 46, Pars. (8, 9), and p. 45, Pars. (1-37);

*Berkeley Pump Co. v. Jacuzzi Bros., Inc.* (9 Cir.), 214 F. 2d 785, at 791;

*Burke Grain Co. v. St. Paul-Mercury Indemnity Co.* (8 Cir.), 94 F. 2d 458 at 463, cert. den., 303 U. S. 661, 82 L. Ed. 1120, 58 S. Ct. 765 (p. 463):

"But, while it was error in the court to hold that the defendant had waived its right to a jury trial by interposing its motion with reservations for a directed verdict, it does not follow that this error resulted in prejudice to the defendant or requires a reversal. It could only be prejudicial if there were in fact substantial evidence upon which the jury might properly have returned a verdict in favor of the defendant. As said by us in General Tire Co. v. Standard Accident Ins. Co., *supra:* 'However, although taking the case from the jury was erroneous, nevertheless "the verdict will be sustained if the evidence was of such a conclusive character that it would have been the duty of the court to set aside the verdict had it been for the other party." Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., *supra* (210 U. S. 1, 28 S. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70).' "

A decision of a judge in taking a case from a jury will be accorded great respect, even in a conflict of evidence case.

> *Patton v. Texas and Pacific Railway Company,* 179 U. S. 658, at 660, 45 L. Ed. 361, at 363, 21 S. Ct. 275.

*On the Issue of the Existence of the Alleged Partnership Agreement, it is Patent that Reasonable Men Could Not Differ from the Finding that* THERE WAS NO PARTNERSHIP AGREEMENT AS PLEADED BY APPELLANT. [Findings, Pars. VII, VIII, IX, X, XI, R. pp. 103-106.] *Conclusive Evidence against Appellant Stems from his own Testimony.*

In his pleadings appellant claimed that: he was an experienced business man; Gunzburg had no business experience; appellant would conduct all the business affairs of the alleged partnership and Gunzburg would devote his attention to the technical end [R. pp. 7, 9].

Now, let us examine this claim in the light of appellant's own testimony.

The most vital contract in Gunzburg's business was his exclusive franchise to sell Polaroid viewers, without which an audience could not view three-dimension motion pictures. Appellant not only did not negotiate this agreement (it was exclusively negotiated by Gunzburg), appellant never even saw a copy of the contract [R. pp. 267-269, 410-411, 1256-1257].

The next most important agreement in Gunzburg's business was the initial licensing agreement for use of the Natural Vision process between Gunzburg and Arch Oboler. This was negotiated entirely by Gunzburg and his attorney, William Hinckle. Appellant did not even

know Oboler at the time it was negotiated [R. pp. 303, 305-306].

Another important agreement for the use of appellee's process was the Warner Bros. licensing contract. Appellant did *not* negotiate this or any other licensing agreement for the use of the Natural Vision process [R. pp. 409-410].

Appellant signed no contracts on behalf of Natural Vision [R. p. 411]. He did not hire or fire help for Natural Vision [R. p. 411]. He had no authority to, nor did he, issue any checks for Natural Vision [R. p. 411]. Appellant never received any information whatsoever as to the bank accounts of Natural Vision [R. p. 411].

Appellant never attended a Board of Directors meeting of Natural Vision Corporation [R. p. 411]. Appellant never held title to any Natural Vision properties [R. p. 411].

Appellant conducted his various business enterprises from his New York office. Although he listed his various enterprises on his door or in the lobby index, he never used the name of Natural Vision [R. p. 412].

Appellant had different letterheads for his various business enterprises but he never used the name Natural Vision on any stationery [Ex. N; R. pp. 412-413].

Although he was familiar with the laws of New York requiring corporations to qualify to do business in New York appellant never qualified Natural Vision Corporation [R. p. 412]. Appellant was also familiar with the laws of New York requiring partnerships operating in New York to file a certificate in that state, but he never filed one for his alleged partnership with Gunzburg [R. pp. 413-414].

Appellant never asked to see any of the business records of Natural Vision [R. p. 414]; never inspected any records of Natural Vision [R. p. 414]; never asked for or received any bank statements of Natural Vision [R. p. 414]; and never received any of the profits of Natural Vision [R. p. 414]. Indeed, *he did not at any time even inquire* if Natural Vision was making or losing money [R. p. 522].

Although he filed income tax returns for the years in question (1951, 1952 and 1953) appellant did not indicate in any of them that he had a partnership with Gunzburg or Natural Vision [R. p. 414]. And, despite the fact that Gunzburg's expenditures exceeded $70,000.00, appellant never contributed any capital to Natural Vision [R. pp. 415; 1203-1205; 1611, 1636].

One of Gunzburg's principal actvities was selling Polaroid viewers. Appellant negotiated to go into such a business *in competition to Gunzburg* [R. pp. 449-451]. Appellant had conversations with the Polaroid Company, the source of Gunzburg's viewers, ascertained that it was not going to renew its agreement with Gunzburg, and, without disclosing this to Gunzburg, gave Polaroid advice on how it could distribute its viewers through outlets other than Gunzburg [R. pp. 451-463].

Appellant knew that part of the business activity of Natural Vision was selling projection booth equipment for 3-D cameras, but he advised his associates to give their business to Altec and RCA, competitors of Natural Vision [R. pp. 471-472].

Perhaps most significant of appellant's lack of good faith and lack of belief that he had a partnership agreement, is his own testimony concerning a commission he received for selling, as agent, the first 3-D motion picture, BWANA DEVIL. In his complaint appellant alleged that he and Gunzburg were to form a partnership for the purpose of commercially exploiting the licensing, manufacture and use of the 3-D camera process [par. Sixteenth; R. pp. 8-9]. And he alleged in Paragraph Nineteenth:

> "In such contract it was further agreed that the net profits of the partnership enterprise would be divided in equal shares between plaintiff Schaefer and (8) defendant Milton L. Gunzburg . . ." [R. p. 10.]

BWANA DEVIL was the first motion picture resulting from Gunzburg's Natural Vision process. On Gunzburg's recommendation, appellant was hired by the producer, Arch Oboler, to supervise distribution. His contract provided that if he sold the picture, instead of supervising its distribution, appellant was to receive a 5% commission. He actually received between $83,000.00 and $84,000.00 for making a sale. Concerning this money the appellant testified as follows:

> "Q. (By Mr. Groman): Now, Mr. Schaefer, this was monies received from the production and exploitation of a motion picture in 3-D. Now is it your understanding that any of that $83,000.00 that you received belongs to Mr. Gunzburg pursuant to the

alleged partnership agreement you had with him? A. No, sir.

Q. You never offered to give Mr. Gunzburg any of that money, did you? A. No, sir." [R. p. 308.]

Capping this most damaging admission is the undisputed fact that *Gunzburg bore 20% of the $83,000.00 commission paid to appellant and appellant was fully aware of this.*[10]

As a climax to his admissions appellant testified as follows concerning his final meeting with Gunzburg:

"Q. I will ask you, Mr. Schaefer, if at that meeting that you stated you felt you had 25 per cent of the stock coming, and that the real fact is that when this was denied you said, 'Just for that, Milton, I am going to ask for 50 per cent.' Did you make that statement? A. Yes, I did."

Certainly in the light of all this testimony which comes from the lips of appellant himself, reasonable men could not differ from the conclusion that not only was there no partnership agreement but *appellant himself did not even believe that there was one.*

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[10]Record, pp. 317-339, note particularly pp. 327-328. The self contradiction and impeachment of appellant by his own testimony illustrated in the record cited immediately above, continued throughout his testimony. See, for example, Record, pp. 250-269, 339-344, 406-409. It is no wonder that the Court in its opinion stated that he "placed little credence upon the testimony of the plaintiff." [R. p. 100.]

III.

## Appellant by His Own Uncontradicted Testimony Has Established That He Was Guilty of "Unclean Hands." Under the Law the Courts Are Closed to Him "in Limine." Since the Burden of Showing That He Has Clean Hands Is on Appellant, and He Has Made No Effort in His Appeal to Overcome His Unclean Hands, He Has Waived Any Right to Be Heard by This Court.

The rule that a plaintiff must enter a court of equity with clean hands has been called "the most important rule affecting the administration of justice."

> *Katz v. Karlsson,* 84 Cal. App. 2d 469, 474, 191 P. 2d 469.

The fundamental principle of law that any unconscientious conduct of a plaintiff, connected with the controversy, will repel him from the Court, *in limine,* is comprehensively set forth in the leading California case of *De Garmo v. Goldman,* 19 Cal. 2d 755, at 764-765, 123 P. 2d 1.

The United States Supreme Court is in accord.

> *Keystone Driller Company v. General Excavator Company,* 290 U. S. 240, 244, 78 L. Ed. 293, 296.

See, also:

> *Singer v. A. Hollander & Son* (3 Cir.), 202 F. 2d 55, 59;
>
> *Ford v. Buffalo Eagle Colliery* (4 Cir.), 122 F. 2d 555, 562, 563.

The doctrine of unclean hands is not merely a matter of defense but is a rule invoked for the protection and dignity of the courts which will refuse to render their assistance to persons guilty of unconscientious conduct.

*Bennett v. Brown,* 206 Cal. 424, 274 Pac. 532;

*Baar v. Smith,* 97 Cal. App. 398, 275 Pac. 861;

*Young v. The Young Holdings Corp., Ltd.,* 27 Cal. App. 2d 129, 80 P. 2d 723;

*Hyland v. Millers Natl. Ins. Co.* (9 Cir.), 91 F. 2d 735, 739, reh. den. 92 F. 2d 462 (cert. den.), 303 U. S. 645, 82 L. Ed. 1107, 58 S. Ct. 644.

It is not merely a matter of discretion, but the *duty* of a court of equity, upon a suggestion of lack of good faith, to inquire into the facts in regard thereto.

*Howe v. Brock,* 86 Cal. App. 2d 271, 194 P. 2d 762.

The California Supreme Court has pointed out in *De Garmo v. Goldman,* 19 Cal. 2d 755 at 765, 123 P. 2d 1, that the *burden of proof is on the plaintiff* to prove his clean hands before he may be heard to assert any rights.

The doctrine of unclean hands is not confined to any particular type of proceeding. Rules of Civil Procedure, Rule 8, (e), (2) provides as follows: ". . . A party may also state as many separate claims or defense as he has regardless of consistency and whether based on *legal or on equitable* grounds or on both. . . ." (Emphasis added.)

*Jessen v. Aetna Life Ins. Co.* (7 Cir.), 209 F. 2d 453, 458;

*Ettelson v. Metropolitan Life Ins. Co.* (3 Cir.), 137 F. 2d 62, 64, (cert. den.) 320 U. S. 777, 88 L. Ed. 467, 64 S. Ct. 92.

It is equally clear under California law that equitable defenses are not confined to equity suits.

*Morrison v. Willhoit,* 62 Cal. App. 2d 830, at 838; 145 P. 2d 707;

*Richman v. Bank of Perris,* 102 Cal. App. 71, 83; 282 Pac. 801;

See also:

Restatement of Agency, Sec. 469, p. 1102;

*Lamdin v. Broadway Surface Advertising Corp.,* 272 N. Y. 133; 5 N. E. 2d 66 at pp. 66-67;

*Raymond v. Davies,* 293 Mass. 117; 199 N. E. 321; 102 A. L. R. 1112.

So that even *assuming for the purposes of argument* that the action below were legal instead of equitable, the doctrine of unclean hands would have been a proper defense.

**Facts.**

The facts as to appellant's unclean hands are not in dispute. They come from appellant's own testimony and writings and from the testimony of his witnesses; and there is no contrary evidence.

All of this evidence must be considered in the frame of reference created by appellant's allegations in his complaint that he was Gunzburg's partner. For the purpose of *evaluating* his conduct *appellant must,* of course, *be deemed bound by his allegations.*

Appellant was aware that Gunzburg was engaged in the sale, installation and servicing of equipment for the

projection of 3-D motion pictures [R. p. 472]. Nevertheless, appellant agreed to furnish competitors of Gunzburg, Altec and RCA, with a list of theatres needing such equipment and even wrote a form of announcement to the press concerning this arrangement [R. pp. 470-472; Deft. Ex. R].

Appellant knew that Gunzburg was engaged in the business of selling Polaroid viewers and *claimed* to have an interest in such business [R. p. 449]. Yet, appellant actively discussed with Arch Oboler going into the viewer business in competition with Gunzburg [R. p. 450]; and he conducted an investigation into sources of supply for this competitive business [R. pp. 451-452].

Gunzburg secured his viewers, as appellant full well knew, from the Polaroid Company [R. p. 453]. Nevertheless, appellant secretly met with officials of the Polaroid Company, ascertained they did not propose to renew their contract with Gunzburg, and not only did not communicate this vital information to Gunzburg, but advised the Polaroid people whom they should turn to in place of Gunzburg [R. pp. 453-463. And compare, particularly, appellant's testimony on page 461 with the testimony of his own witness, Arch Oboler, R. pp. 1092-1093].

Appellant *claimed* to be Gunzburg's partner in a 20% ownership in the profits of the first 3-D motion picture Bwana Devil. Nevertheless, while acting as agent *to sell* the picture to United Artists and without any disclosure to Gunzburg, appellant negotiated secretly to join with

United Artists *in buying* the picture.[11] In addition to appellant's conduct as agent in the ultimate sale of BWANA DEVIL to United Artists at a price of $1,750,000.00 [R. p. 325], his testimony revealed that his initial negotiations were with others who wanted to purchase the picture *at a much higher figure* [R. pp. 415, 420, 432-433].

At the point in the trial where this testimony was disclosed, counsel for appellees *proposed* to demonstrate by appellant's own testimony (it being indisputable by appellant since it was all contained in his own deposition which was filed with the court, [Dep. pp. 116-121; 559-643] that appellant had initiated a secret scheme to kill higher offers by other purchasers so that he could secretly join with one Edward Alperson in buying the very picture he was entrusted, as agent, to sell. At no time did he disclose these secret negotiations to Gunzburg. As a result of appellant's scheme a $2,500,000.00 and a $2,000,000.00 offer were rejected, and, eventually, the picture was sold to United Artists for $1,750,000.00, causing Gunzburg a loss of 20% of the difference between $2,500,000.00 and $1,750,000.00.

Counsel for appellees was directed by the Court to make an offer of proof on this point. This was done [R. pp. 415-449, particularly pp. 442-449].

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[11]Deposition of Seymour M. Peyser, p. 8 and Exhibit 1 to the said deposition, the said deposition being offered in evidence as *plaintiff's* Exhibit No. 52 [R. p. 668]; the portion of the deposition referred to is found on p. 673 of the Record. See also, deposition of Robert S. Benjamin, *plaintiff's* Exhibit No. 53, Record, p. 702 and Record, pp. 705-709.

Apart from the actual injurious results of appellant's various undisclosed schemes, and course of unconscientious conduct, the law is quite clear that it is not necessary for a party to succeed in unconscientious conduct in order to be guilty of unclean hands. The mere attempt is sufficient.

*Belling v. Croter,* 57 Cal. App. 2d 296 at 306; 134 P. 2d 532; and

*Hyde Park Amusement Company v. Moglar,* 358 Mo. 336; 214 S. W. 2d 541 at 545.

So paramount is the doctrine of unclean hands that it was considered and adopted as a ground for reversal in *De Garmo v. Goldman,* 19 Cal. 2d 755; 123 P. 2d 1, although it was not pleaded and was raised for the first time after the appeal was filed (See p. 771 of the dissenting opinion).

In the instant case the appellant's unclean hands were specifically pleaded as an affirmative defense [R. pp. 70, 73, 74], and during the trial evidence of the appellant's unclean hands was introduced through the testimony of appellant himself. This testimony stands uncontradicted on the record and appellant has made no effort to explain it away. Nor has he in any way attempted to justify it in his appeal.

Since there is no conflict in the evidence as to appellant's unclean hands, and since, patently, reasonable men could not differ that such conduct constituted unclean hands, as a matter of law, appellant can have no standing

to pursue his suit, either in the court below or here on appeal.

*Rosenfeld v. Zimmer,* 116 Cal. App. 2d 719; 254 P. 2d 137;

*Belling v. Croter,* 57 Cal. App. 2d 296; 134 P. 2d 532;

*Hyde Park Amusement Company v. Moglar,* 358 Mo. 336; 214 S. W. 2d 541, 544.

The trial court in his opinion made no ruling on the defense of unclean hands [R. p. 100]. Nevertheless, the existence of uncontradicted evidence establishing the fact of plaintiff's unclean hands may properly be directed to the attention of this court on appeal; for it is well established that if a party below is entitled to a directed verdict *on any ground,* a direction of a verdict in his favor will be sustained.[12]

*Automobile Underwriters of Des Moines v. Bloemer* (8 Cir.), 94 F. 2d 474, 477;

*Smith v. S. S. Kresge & Co.* (8 Cir.), 79 F. 2d 361; at 362, 363.

And generally see:

*McCluer v. Heim-Overly Realty Company* (8 Cir.). 71 F. 2d 100, at 101.

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[12]This same principle of law applies equally, of course, to Argument II above.

## Conclusion.

On the face of appellant's complaint, his action patently was equitable and not legal and so he was not entitled to a trial by jury. Even had he been entitled to a trial by jury, no prejudicial error resulted from the judgment of the court below, since, in any event, on undisputed and overwhelming evidence a direction of a verdict in favor of the appellees would have been proper on two distinct grounds.

For these reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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ARTHUR GROMAN,
*Attorneys for Appellees.*